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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Washington, D. C.,
Attorney for Petitioner.

RICHARD H. HANNA,
Special Attorney for the Department of the Interior,
Albuquerque, New Mexico

WILLIAM A. BROPHY,
Special Attorney for the Pueblo Indians, Albuquerque,
New Mexico.

FELIX S. COHEN,
Assistant Solicitor, Department of the Interior,
Washington, D. C.,
Of Counsel.

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REPLY BRIEF FOR THE UNITED STATES

STATEMENT OF ISSUES

A considerable part of the respondent's brief is directed to meeting arguments that the Government has not made in this case and does not intend to make. It may assist the Court in clarifying the real issues in the case to note briefly those arguments which the respondent has erroneously ascribed to the Government and which

the Government does not advance and does not need to advance.

The respondent's brief misconceives in at least six respects what it is that the Government seeks to, or needs to, demonstrate in order to prevail in this appeal.

(1) *The Government does not seek or need to show that it was without power in 1866 to confer upon the railroad the title to all lands in controversy.*

Respondent's suggestion that the Government is attempting to impugn its own power to convey title (Respondent's brief, pt. 1, pp. 11, 25, 106) is without basis. That the Government had title to these lands and the power to convey such title to the respondent's predecessor is not in dispute (Petitioner's main brief, pp. 5–6). Totally irrelevant, therefore, is the argument of the respondent which demonstrates, by the marshaling of various reports, that the lands here in litigation were, at the time of the 1866 Granting Act, public lands, the title thereto being vested in the United States regardless of any Indian possessory claims (Respondent's brief, pt. 1, pp. 15, 41–46, 56, 60, 90–95).

(2) *The Government does not seek or need to deny that the railroad has title to the lands in dispute.*

Respondent's assertion that the Government is denying the title of the railroad (Respondent's

brief, pt. 1, p. 60) and seeking to assert that title to these lands is vested in the Indians or in the United States (*ibid.*, pp. 11, 25, 45) is without merit. Petitioner has conceded that title to the lands in dispute was vested in the respondent by the 1866 Granting Act (Petitioner's main brief, pp. 5–6, 13). Entirely immaterial, therefore, to any point in dispute is respondent's detailed argument that Congress has always had, and sometimes asserted, the power to convey to third parties title to public lands occupied by Indians (Respondent's brief, pt. 1, pp. 44–45, 60, 68–71); that the 1866 Granting Act, construed in the light of its legislative history, transferred title to the grant lands to the railroad (*ibid.*, pp. 13–23); that the Secretary of the Interior issued patents covering some of these lands to the railroad and duly found that title to some of these lands had been granted by the 1866 act (*ibid.*, pp. 4, 68–71, 103); and that a similar assumption as to the conveyance of title to these lands was made by Congress and the courts on various occasions (*ibid.*, pp. 5, 13–23, 60–68, Appendix, pp. 100–106). Obviously the transfer of legal title tells us nothing at all concerning rights of tenancy or occupancy at the time of transfer, since it has long been recognized that Indian occupancy right (sometimes characterized as "Indian title"), is not incompatible with ownership of the land in fee by a government or a private party.

(3) *The Government does not seek or need to show that Walapai occupancy rights are valid against the United States.*

The contention of the respondent that the Government seeks in this suit to establish in the Walapai Tribe rights against the United States (Respondent's brief, pt. 1, pp. 8, 11, 25, 27, 76, 106) is a misrepresentation of the Government's position. The Government has expressly noted that the question of Indian rights against the United States is an issue "never properly involved in the case at bar" (Petitioner's main brief, p. 9), and has carefully noted that the issue actually involved in this case is whether the Walapai Tribe enjoys a right of possession against "parties other than the United States" (Petitioner's main brief, pp. 15, 16, 29, 36, 67). Indeed, the Government has gone further and in its main brief has expressly recognized the *power* of the sovereign to extinguish Indian possessory rights (main brief, p. 67), and has noted that such rights are "subject only to divestiture by the Government itself" (*ibid.*, p. 72). The important question in the case is whether this power was exercised (*ibid.*, p. 12). Entirely immaterial, therefore, are those portions of respondent's brief which seek to demonstrate that Congress did not intend, by the Granting Act, to "limit its otherwise sovereign power" (Respondent's brief, pt. 1, pp. 23–28), that the Constitution confers such power upon Congress

(*ibid.*, pp. 28–30), that the Walapai Indians have no such vested rights as would preclude the exercise of such power by Congress (*ibid.*, pp. 8–9, 30–36), and that the power of Congress to terminate Indian occupancy rights remained unimpaired (as a matter of domestic law, although not of international obligation) by the Treaty of Guadalupe Hidalgo (*ibid.*, pp. 38–39, 72–73), or by any other act or treaty (*ibid.*, pp. 44, 67, 77–78).

(4) *The Government does not seek or need to show that the Walapai Tribe had title to lands under Spanish or Mexican law or that Spain or Mexico were without right to extinguish Indian possession.*

Respondent assumes that the Government has attempted to establish that the Walapai Tribe had, under Spanish and Mexican law, either a perfect title or a possessory right beyond the power of the sovereign to terminate (Respondent's brief, pt. 1, p. 41, pt. 2, pp. 8–11). No such contention has been made by the Government and, indeed, the Government has expressly conceded that Spanish law recognized "the *power* of the sovereign to extinguish Indian possessory rights" (main brief, p. 67) and noted: "The fact that the Spanish Crown might terminate such rights, with or without compensation, does not disprove the existence of the right." (*Ibid.*, p. 71.) Immaterial, therefore, to any issue in this case is the persuasive argument of the respondent that title to lands

occupied by Indians was claimed by the Spanish Crown, in the absence of some royal grant or recognition of Indian ownership (Respondent's brief, pt. 2, pp. 3, 5, 6, 7); that "The fact of possession by an Indian tribe was no basis of a title" (*ibid.*, p. 13); that although Indians had legal rights (*ibid.*, p. 2), "they had no rights which could be urged against the Crown or its officers" (*ibid.*, p. 11); and, finally, that Christian sovereigns, according to certain Spanish authorities, had the power to confiscate the property of Indians who were "unbelievers" (*ibid.*, p. 9).

All these points, for purposes of this case, petitioner concedes. All that petitioner is concerned to maintain, and all that petitioner has asserted in its main brief (as distinguished from what some of the cited original authorities assert), is that a right of occupancy valid against parties *other than the sovereign*, existed, under Spanish and Mexican law, in Indians who maintained continuous possession of an area from time immemorial. In other words, the Spanish and Mexican law accorded to Indian occupancy the same kind of recognition that the law of the United States later accorded (Petitioner's main brief, pp. 61, 67, 71–72).

The respondent admits these contentions of the petitioner. It admits, in effect, that the claim of Spanish sovereignty did not, *ipso facto*, terminate prior "personal rights" of Indians (Respondent's brief, pt. 2, p. 4); that organized Indian com-

munities could acquire perfect property rights by prescription (pp. 7–8); that "property rights" might be founded, in the absence of specific grant, upon a law or decree confirming rights claimed before[1] (*ibid.*, p. 5); and that under Mexican law grants to "lands of which native Indians are in possession, when they lack a title granted by competent authority," have been construed in such a way as "to avoid dispossessing them" (*ibid.*, p. 13).[2]

So far as Spanish and Mexican law has any application to this case, petitioner's argument is a purely negative one: that Spanish and Mexican law was not different from the law of the United States in any respect which would compel discriminatory treatment against Indians of the Mexican Cession. Such discriminatory treatment is insisted upon in the opinion of the Circuit Court of Appeals below (R. 206–210). To the extent that respondent now concedes (Respondent's brief, pt. 1, pp. 12, 72) that no such difference is to be found, this issue has now been eliminated from the case, and if the decision of the Circuit Court of Appeals is to be

[1] Such laws and decrees recognizing Indian possessory rights in described situations are cited in petitioner's main brief at pp. 66, 68, 69, and 70.

[2] Noting these concessions, it becomes unnecessary to deal with minor points of difference between the view of the respondent and that maintained by Chief Justice Marshall and many later justices of this Court (Petitioner's main brief, pp. 62, 72 76) as to the legal character of those rights of occupancy or possession which, as respondent concedes, were effectually recognized by Spain and Mexico.

affirmed, it must be for some reason other than that which the Circuit Court itself asserted. The only such reason put forward by the respondent is the argument that throughout the United States, outside of the Mexican Cession as well as within that area, there are no Indian rights based on aboriginal occupancy (*ibid.*, pp. 75–103). This argument petitioner elsewhere meets on the merits.

(5) *The Government does not seek or need to show any rights against grantees of the United States other than the railroad.*

Respondent asserts that the Government seeks in this action to establish Indian ownership to one-eighth of Arizona (Respondent's brief, pt. 1, p. 2) or to the entire State (*ibid.*, p. 23), including those portions of Arizona occupied by cities, settlers and purchasers. No such contention has been made by the Government. If the complaint contains some assertions broader than the issues of the case, this may be ignored as mere surplusage. The suit is brought against the railroad and the only lands in issue are railroad grant lands within a specified area which are actually occupied by Walapai Indians. The position of the Government with respect to these lands is based upon the particular language of the grant and does not apply to lands granted under different statutes. The complaint itself expressly notes, even with respect to railroad grant acts, that the Indians make no

claim to lands which "have been subsequently assigned to innocent holders and assignees" (R. 19). If, by this action or by any argument advanced in support of the Government's position, the Government were actually seeking to establish a possessory right to all of Arizona or to one-eighth of Arizona in the Walapai Tribe, there would be a good deal of persuasiveness in the detailed argument of the respondent that any such attempt would run counter to the general policy of the United States as expressed in various acts of Congress and reports of administrators. That, however, is not the issue before this Court and the arguments of the respondent's brief bearing upon that issue are beside the point, as are the fears expressed in the brief filed for the State of Arizona and certain counties thereof as *amici curiae* in this case (at pp. 1–2, 4–7).

(6) *The Government does not seek or need to show that it will be able to sustain the allegations of the complaint as to all the lands in litigation.*

Respondent assumes that the Government must be in a position to prove Walapai occupancy right against the railroad with respect to all the lands involved in this litigation or else must utterly fail (Respondent's brief, pt. 1, pp. 26, 62). It over-

looks the obvious alternative that the Government may be able to prove Walapai possessory right in some greater or smaller part of the lands in litigation. This possibility has repeatedly been noted by the Government (Petitioner's main brief, pp. 15, 103–104; petitioner's brief on application for writ of certiorari, p. 2; petitioner's reply brief on application for writ of certiorari, p. 12).[4] This all-or-none fallacy of the respondent vitiates the argument that much legislation and administration directed to the lands described in the complaint is inconsistent with the allegation of the complaint that *all* of these lands are subject to Walapai possessory rights (Respondent's brief, pt. 1, pp. 18–28, 38–71).

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[4] Thus petitioner's reply brief in support of petition for certiorari declared: "Repeatedly the respondent's brief (pp. 2, 11–14) and the opinion of the court below (R. 208–209) confuse the issue presented by the pleadings by arguing that Congress could not have intended to withhold from disposition the whole of the extensive area designated in the second cause of action of the complaint, and inferring that therefore there are *no* Indian rights in any part of the area. This argument is a *non sequitur*. Petitioner seeks an opportunity to establish some possessory rights in this area. Even if the petitioner, on the trial, should succeed in proving permanent possession and possessory rights only in those villages or settlements, outside the reservation, which the Walapai have occupied from time immemorial and still occupy, the petitioner would be entitled to a substantial judgment in its favor. Dismissal of the complaint precludes any such proof."

ARGUMENT

POINT 1

THE RAILROAD RECEIVED NO RIGHT TO IMMEDIATE POSSESSION, UNDER THE 1866 GRANTING ACT, WHERE LANDS WERE IN THE ACTUAL POSSESSION OF INDIANS.

Respondent's brief clarifies the issue before this Court by conceding (Respondent's brief, pt 1, pp. 12, 104–108) that the factual assertions of the complaint are to be deemed true, for purposes of this proceeding, and by characterizing as "irrelevancies" (*ibid.*, 13) the contrary assertions made by the respondent (R. 30–32, 71) and adopted by the courts below (R. 192–196, 211) as to the surrender or abandonment of Walapai possession and as to the lack of permanent occupancy by the Walapai Tribe of any lands whatever. The allegation of the complaint that the respondent has interfered, and threatens to interfere, with the Indian possession of the lands described (R. 8, 19–20) is not controverted or controvertible before this Court. The respondent seeks simply to justify such acts on the ground that matter of which the Court may take judicial notice establishes that the respondent is "the legal and equitable owner of the unburdened and unqualified fee simple title to all lands in controversy" (R. 25). Thus the issue before the Court has been narrowed down to the

issue of whether acts which would otherwise be unlawful are justified by matters of which a court may take judicial notice. If all of the acts so alleged are thus legally authorized as to all of the lands described in the complaint, then the complaint was properly dismissed. Otherwise it was not. *United States* v. *Mackey*, 216 Fed. 126 (C. C. A. 8th, 1914).

The primary question, therefore, is not, as respondent misconceives it, whether the Government or the Walapai Tribe has title to the lands in controversy (see pp. 2–3, *supra*), or even whether the Government or the Walapai Tribe has any exclusive property right at all in these lands, but rather whether the railroad has such a property interest in these lands as warrants it in interfering with the use of these lands by an Indian tribe and even in ejecting the tribe from areas tribally occupied from time immemorial. If the railroad has no such interest, then it is in no better position than a trespasser and clearly the United States would be entitled to protect its ward, the Walapai Tribe, from interferences such as are alleged in the complaint. It would have this right even if the Walapai Tribe were a mere licensee or permittee, subject to removal by the Government, so long as the Government has not actually removed the Walapai Tribe from the lands in question. And respondent has not, in support of its motion to dismiss, adduced any public act of which judicial notice could be taken removing

the Walapai Tribe from all the lands in litigation or even any act requiring such removal. (See pp. 41–69, *infra*.)

A plaintiff in possession need not allege or prove more than his possession in order to prevail in an action in trespass against a defendant who attacks the plaintiff's title or right to possession but does not show any superior right to possession in himself.[1] And when plaintiff happens to be the United States suing on behalf of a ward, which is alleged to have maintained continuous possession of described lands from time immemorial, there should be no doubt that it is entitled to relief unless the defendant enjoys a right to immediate possession sufficient to justify the acts of which complaint is made.

Thus the bare minimum which the Government must show, to warrant a reversal of the judgment dismissing the complaint, is that, as to at least some part of the area in which these acts of trespass by the railroad are alleged to have been com-

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[1] *Christy* v. *Scott*, 14 How. 282 (1852); *Burt* v. *Panjaud*, 99 U. S. 180 (1878); *Bradshaw* v. *Ashley*, 180 U. S. 59 (1901); *Williamson & Brown Land & Lumber Co.* v. *Mullins Lumber Co.*, 249 Fed. 522 (C. C. A. 4th, 1918).

Where lands are in actual possession of an Indian tribe, it has been held that an action of trespass will lie even against a grantee with a right to immediate possession, since the power to compel removal of an Indian tribe can be exercised only by the United States *Fellows* v. *Blacksmith*, 19 How. 366 (1856); and see *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886).

mitted, the railroad, if the factual allegations of the complaint are true, has no such right to immediate possession as would justify these acts.

The right to immediate possession of these lands asserted by the railroad derives from the 1866 granting act (act of July 27, 1866, 14 Stat. 292). If we examine this act, we find only three provisions which could possibly serve as a basis for any claim to title or possession by the railroad:[5]

(a) Section 3 of the act grants to the railroad, over a prescribed route, designated sections of public land—

> whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office: * * *

(b) Section 2 of the act contains this promise:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

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[5] It should be noted that despite the suggestion of the respondent to the contrary (Respondent's brief, pt. 1, p. 26), no claim is made in this action as to the actual right-of-way conferred on the railroad by section 2 of the act cited.

(c) Section 17 of the act provides:

> That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

If the grant under section 3, above cited, of lands "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights" stood alone, the railroad would not have acquired those lands occupied by Indians under a claim of right. Such was the decision in *Cramer* v. *United States*, 261 U. S. 219 (1923) and such was the decision in *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733 (1875). In both these cases the granting act contained language similar to the language found in section 3 of the 1866 granting act but did not contain a promise to extinguish Indian title as found in section 2 of the 1866 act.

In the case of *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886) the granting words, similar to those of the 1866 act, were accompanied by a promise to extinguish Indian title in the lands granted. This Court, construing the statute as a whole, held that in order to give meaning to this promise the terms of the grant itself were to be enlarged so as to cover lands claimed by Indian occupants.[8] At the same time the Court held that as to such lands the railroad would take immediately only a bare title and that a right to immediate and exclusive possession would attach to the title when and only when the United States carried out its promise to free the land from the burden of Indian possession. This holding was followed in the recent decision of this Court in *Northern Pac. Ry. Co.* v. *United States*, 311 U. S. 317 (1940).

The Government agrees that in the case at bar, where the language of the grant and of the promise to extinguish Indian title correspond in all material respects to that found in the *Buttz* case, a similar result should be reached: the railroad should be deemed to have received, by virtue of the act itself, a legal title plus an expectancy based on the promise of the Government that a

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[8] This distinction between the *Buttz* case and the *Leavenworth* case is expressly noted in *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, 543 (1892), by Justice Field, who had dissented in the *Leavenworth* case but acknowledged the error of this dissent 17 years later in the *Bardon* case.

right to immediate and exclusive possession would be superadded to the title at such time as the Government, with Indian consent, should find it to be "consistent with public policy and the welfare of the Indians" to terminate Indian possession and should act pursuant to that finding. This, however, according to the allegations of the complaint the Government has not yet done. On the contrary, from before 1866 to the date of the suit, the Walapai Tribe is alleged to have remained, as a ward of the Government, in actual possession, continued and exclusive, of the lands described in the complaint (R. 19).

Respondent seeks to escape the force of the holding of this Court in the *Buttz* case by arguing that because section 17 of the 1866 granting act authorizes the railroad to accept grants from Indian tribes located on reservations through which the railroad might pass, the promise of the Government to extinguish Indian title on grant lands must have referred only to reservation lands (Respondent's brief, pt. 1, pp. 16–17). This is a complete *non sequitur*. In fact, if the promise of the Government to extinguish Indian title applied *only* to those lands covered by section 17 of the act, as respondent contends, there was no compelling reason for including any such promise by the Government in the act. Under the respondent's construction, whatever the railroad could acquire under section 2 by action of the

Government with Indian consent it could just as well acquire under section 17 by action of the Indians with Government consent. If the promise of the Government to extinguish Indian title is to be given any real significance, it is necessary to hold that this promise was not directed or restricted to formal reservations (which at the time did not exist over a large part of the country to be traversed by the railroad), but that the Government's undertaking covered also (or perhaps solely) nonreservation lands claimed by Indian tribes or by individual Indians under right of aboriginal occupancy. Indeed this Court has recently held that a similar grant conveyed lands subject to the aboriginal right of occupancy where such lands were not within "technical reservations" (*United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 348–349 (1940)) and suggested that the lands within "technical reservations" would not be covered by the "extinguisher" clause and in fact would not be conveyed at all (*ibid.*, at pp. 349, 353–354). To the same effect is *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283 (1918).

If there were any doubt as to the propriety of including aboriginal occupancy claims within the scope of the "extinguisher" clause, that doubt would be resolved by administrative interpretation, not of other laws but of this particular undertaking, pursuant to which the Government,

during the two years following enactment of the granting act, secured cessions of aboriginal occupancy rights covering most of the land which the railroad was to traverse, from several Indian tribes, including some that had not previously had reservations or made treaties (Petitioner's brief, pp. 48–51).

If, however, it were to be held that the undertaking to extinguish Indian possessory rights related only to reservation lands, then the proper conclusion from this premise would be not that nonreservation lands claimed by Indians passed to the railroad, free and clear of all Indian claims, but that such lands were *not covered by the grant at all.* For if the promise to extinguish Indian title did not cover such nonreservation claims, we should have the situation presented by the *Cramer* case and the *Leavenworth* case.

There would be no necessity to give meaning to other phrases of the granting act by bringing lands so held and so claimed within the phrase "public lands * * * not reserved * * * and free from preemption or other claims or rights," which, on its face, excludes these lands. It would then have to be held that the railroad took nothing at all as to such lands.

The Government submits that the fairer interpretation of the statute is that the undertaking of the United States was a general undertaking to extinguish all Indian possessory claims burdening the lands granted and that all lands covered by

these claims passed to the railroad subject to whatever right or claim of occupancy the Indians had, as in the *Buttz* case.

No canons of construction have been cited by the respondent which would require or justify any different conclusion as to the interpretation of the granting act.[7]

Respondent has shown no law subsequent to the 1866 granting act which amends the procedure expressly set forth in the granting act whereby the right to immediate possession might be added to the legal title conveyed to the railroad.[8]

If respondent is to prevail, then, it must show that the Government has, by extinguishing Indian possession as to the lands described in this complaint, enlarged the rights originally conferred upon the railroad. The complaint itself asserts that the Indians have continued in possession of these lands, from which it may be deduced that the United States has not removed the tribe from these lands. The respondent has advanced many arguments to show a loss of Indian possessory rights as to those lands which the Indians have voluntarily abandoned, or from which they have been forced to remove; but it has advanced no argument whatsoever to show any extinguishment by the Government, with Indian consent, or even without Indian consent, of any right or any claim

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[7] The matter of applicable canons of interpretation is dealt with at pp. 41–45, *infra*.

[8] See pp. 63–69, *infra*.

in lands which the Walapai Indians still claim and occupy as their own. Respondent, therefore, has failed to show the only possible basis on which the alleged acts of trespass asserted in the complaint, could, as a matter of judicial notice, be defended.

Point 2

Respondent has advanced no sound reason for overthrowing the long-established doctrine that aboriginal occupancy of a defined area by an Indian tribe confers upon the tribe a possessory right which can be extinguished only by the United States.

The case of the Government, as indicated in the preceding discussion, does not depend upon proof that the Indian possession alleged in the complaint involves a legal title or even an exclusive possessory right. The mere fact that the land was, as alleged in the complaint, possessed and claimed by Indians whose aboriginal possession had not been terminated by removal or abandonment (R. 4, 8–10, 15–19) prevented the railroad from acquiring, by virtue of the Granting Act, anything more than a legal title together with a conditional promise of the Government to extinguish the Indian claim and possession, if and when certain conditions should be found to exist.

The respondent has not demonstrated either that the Government is bound to allege more than this, as a matter of law, or that it has alleged less than this as a matter of fact. The respond-

ent's entire argument, so far as relevant to the case at all, is designed to show that the Walapai Indians are without an exclusive possessory right to the lands in question. This contention is not only legally inadequate to sustain the dismissal of the complaint, but it is also erroneous as a matter of law.

The Government, in its main brief, made no attempt to prove the soundness of the general rule that aboriginal occupancy gives rise to a right of possession valid against all parties other than the United States, because this rule is so elementary and so basic in Federal Indian law that the Government never expected that respondent would challenge the rule. Indeed, the Circuit Court of Appeals in its opinion below (R. 206–210) expressly acknowledged the validity of this rule, questioning only the applicability of the general rule to the area of the Mexican Cession because of alleged peculiarities of Spanish and Mexican law.*

* "Appellant argues that there is uniform governmental policy of recognizing rights of occupation as vested in all Indian tribes with respect to land actually occupied by them at the time they were brought under the sovereignty of the United States and that such rights were good against all but the Government of the United States. It must be conceded that this view is consistent with what has been the common practice in dealing with the Indians occupying lands other than lands within the area ceded by Mexico to the United States. Cf. *Bates* v. *Clark*, 94 U. S. 294; *Spalding* v. *Chandler*, 160 U. S. 402, 403. Their practice, has been based upon the policy of maintaining just and peaceable relations with the Indians and is discussed and considered

Respondent's brief now challenges the basic doctrine of aboriginal occupancy rights, denying that aboriginal occupancy confers any rights whatever. The whole doctrine of aboriginal occupancy rights, respondent now contends, is erroneous, a figment, as respondent says, of "universal absolutes in the dictum of cases" (Respondent's brief, pt. 1, p. 10), "metaphysical dictum" (*ibid.*, p. 82), "a mistaken generalization of history" (*ibid.*, p. 75), "pernicious abstractions" (*ibid.*, pp. 76–77), and perhaps even a belief in the "Great Spirit" (*ibid.*, p. 82). For this reason, respondent is not under the necessity of meeting the detailed argument of petitioner's main brief (pp. 15–59), showing that the

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in a number of early cases, such as *Johnson* v. *Graham*, 8 Wheat. 543, decided in 1823.

"But, since the whole of the Indians' title depends entirely upon the policy of the federal government, it is obvious that what may have seemed the best policy in dealing with Indians in territories acquired prior to the treaty of Guadalupe Hidalgo might not have seemed the best policy in dealing with Indians occupying the area ceded by Mexico in that treaty." (R. 206.)

The Circuit Court and the respondent frequently refer to the recognition of Indian title as a matter of "policy" rather than "law." The distinction is relevant only where the issue is between the Indians and the United States, as to which it may reasonably be urged that Indians are protected in what they claim on legal grounds but not in what may or may not be granted as a matter of policy. The distinction, however, is irrelevant as to third parties. The rights of a tenant at will may be terminated by the landlord as a matter of policy or discretion but this does not make any the less legal the rights of the tenant at will against a trespasser.

law and policy applicable to the Mexican Cession area corresponded precisely with the law and policies of the United States applicable in other areas.

This argument of the respondent against the existence of aboriginal occupancy rights has at least the merit of directness and courage, for it would be difficult to find any doctrine in American law that has been more persuasively maintained or more consistently followed, in the decisions of this Court, than the doctrine of aboriginal occupancy rights first formulated by Chief Justice Marshall in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823), which is cited with approval in some 32 subsequent cases in this Court.

In its criticism of the doctrine of aboriginal occupancy rights, respondent does not cite a single decision of this Court which is inconsistent with that doctrine, but contents itself with a demonstration that in 13 of the cases in which that doctrine has been maintained some special circumstances existed rendering it unnecessary for the Court to lay down any general rule broader than the facts of the particular case.

It is true, of course, that any general rule is broader than the facts of any given case, but this is not a valid reason for rejecting the rule as inaccurate. In order to justify such a rejection it must be shown that the rule criticized ignores operative facts in the cases and that some alternative rule takes account of such operative facts

in the cases. Neither of these burdens is borne by the respondent. The respondent does suggest an alternative rule, namely, that Indians have no rights of occupancy except such rights as have been specifically [19] conferred upon particular tribes by treaty or otherwise. Respondent does not show that even under the rule it proposes the Walapai would be without rights, and there is a good deal of administrative action recognizing Walapai claims to all or part of the lands described in the complaint. (Samples of this material are set forth or cited at pp. 37–42 of Petitioner's Appendix.) It is more important, however, to point out that the rule of law proposed by respondent is not supported by any direct authority, and certainly not by any authority emanating from this Court.

At most, respondent shows that in two of the 13 cases which it considers, to wit, *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823), and *Mitchel* v. *United*

[19] The emphasis upon "specific" conferring of rights upon a particular tribe is made by respondent whenever it considers general legislation under which the Walapai claim protection. Nevertheless, in attempting to "distinguish" cases recognizing aboriginal occupancy rights where there was in fact no specific grant and no specific recognition of rights in the tribe concerned by the sovereign, respondent uses the phrase "specifically conferred" and other similar phrases to cover the recognition of Indian rights by general rules and statutes (Respondent's brief, pp. 81, 84). So applied, respondent's argument ceases to have any pertinence to the case at bar, since clearly the Walapai Tribe is not excluded from rules and statutes of general scope.

States, 9 Pet. 711 (1835), this Court might have limited its statements about occupancy rights to situations where treaties existed. The fact remains that this Court even in these two cases did not base its opinion on the existence of treaty rights and could not reasonably have done so since the treaties involved, here as elsewhere, purport not to create new rights but to confirm, define, diminish, or reinstate prior Indian rights.

The only alternative which the respondent suggests to the accepted theory of aboriginal occupancy rights is the doctrine that all Indian rights in land must be based upon some specific act of the sovereign creating rights in a particular tribe. According to this theory, the first treaty of land cession between the United States and any Indian tribe amounts to a grant of land from the United States to the Indians. The language of such treaties indicates precisely the reverse.[11] It was the Indians who ceded land to the United States, reserving for themselves such lands as they needed or else accepting in exchange for the cession a grant of lands

[11] Typical is the language of the Treaty of August 3, 1795 (7 Stat. 49), with the principal tribes of the Northwest Territory in which "the said Indian tribes do also cede to the United States the following pieces of land" (Art. 3) and the United States assumes an obligation to pay to the Indians a fixed sum in consideration of the "cessions and relinquishments of land made in the preceding article by the said tribes of Indians" (Art. 4). For a further analysis of similar treaty provisions, see Cohen, *Handbook of Federal Indian Law* (1941), pp. 43–47, 48–67.

in another locality. The language of the treaties corresponded to reality and cannot now be impugned by the respondent as involving a course of studied deceit and hypocrisy. If treaties of cession were really grants of land by the United States to the Indians, the Indians should have paid the United States. The fact remains that regularly, in these transactions, it was the United States that paid the Indians.

The attempt of the respondent, therefore, to characterize as irrelevant all cases in which treaties may be found involves an utter misconception of the scope and function of Indian treaties. In *United States* v. *Winans*, 198 U. S. 371 (1905), this Court noted that Indian treaties must be read as limitations upon preexisting aboriginal rights and not narrowly construed as grants to the recipients of charity:

> At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.
>
> * * * * *
>
> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians

> than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. * * * [At pp. 379, 381.]

Finally, if we consider respondent's criticism (Respondent's brief, pt. 1, pp. 75–88) of cases in which the rule of aboriginal occupancy rights is stated and applied, we find that the criticism ignores not only the reasoning of the Court and the language of the treaties in all eight of the cases considered but also the actual decisions in at least six of these cases. Had respondent devoted its analysis to the consistency or inconsistency of these decisions with the theory that it proposes, instead of trying to demonstrate the existence of various irrelevant factors in each case, it would have been compelled to come to the following conclusions:

1. *Worcester* v. *Georgia*, 6 Pet. 515, 546 (1832), squarely rejects, and is inconsistent with, the respondent's theory. In that case the charter from the Crown to Georgia under the theory advanced by the respondent should have given an unencumbered title over the Cherokee country to Georgia, leaving no rights in the Indians and, particularly, no rights which the Indians could later convey to the United States. Had this Court

accepted this theory, it should have decided the case in favor of the State of Georgia. It decided the case the other way on the express ground that the grant to Georgia left intact the aboriginal possessory right, which was later the subject matter of treaties between the Cherokee Nation and the United States.[12]

2. In *Chouteau* v. *Molony*, 16 How. 203, 239 (1853), this Court held that a purported grant from a Spanish Governor was ineffective to convey an unburdened title, because the land was subject to aboriginal occupancy rights. Under the respondent's theory, there were no such rights, and the case should have been decided the other way. To point out, as respondent does (brief, p. 82), that the possessory rights of the Fox Indians were whittled down by a treaty with the United States made in 1832 shows not, as respondent suggests, that the Indians had no rights in 1796, the date of the Spanish grant, but precisely the opposite.

3. In *Holden* v. *Joy*, 17 Wall. (84 U. S.) 211 (1872), the defendant, Joy, claimed under certain Indian treaties, while the plaintiff, Holden,

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[12] Erroneous, as well as irrelevant, is respondent's contention (brief, pt. 1, p. 79) that the Cherokee were recognized as a "nation" but that the Walapai were not. The Walapai were just as much a "nation" in the sense in which this term has been applied to Indian tribes as were the Cherokee. Explicit recognition of the Walapai Tribe as capable of "hostility" and "amity" towards the United States is found in *Lake* v. *United States and Hualapai Indians*, 35 Ct. Cl. 15 (1899). (See Petitioner's main brief, p. 24.)

claimed under preemption acts of Congress. On behalf of the plaintiff's claim it was argued that the Constitution expressly vests in Congress control over public property and that a series of treaties made by the President and Senate with Indian tribes could not constitutionally dispose of public land to the defendant in a manner that conflicted with modes of public land disposition prescribed by Congress and availed of by the plaintiff.[13] This Court, in rejecting that argument, and holding for the defendant, pointed out that the occupancy right in the land in question had been in the Indians from the start and was therefore clearly subject to disposition by Indian treaties. This was a direct holding on a principal issue of the case and cannot properly be dismissed as "metaphysical" dicta, as respondent urges (brief, p. 82). Nor can the carefully reasoned opinion of this Court in the case cited be discredited as respondent tries to do (brief, p. 82) because this Court was tolerant enough to state the view of the Indian parties to these treaties, using in that context the Indian expression, "Great Spirit," at the same time that it stated in more technical terms the views of the white parties to these treaties.

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[13] A similar argument is advanced by respondent in this case to show that the creation of a reservation for the Walapai by Executive order in 1883 was "a void effort to achieve a prohibited end." (Respondent's brief, pt. 1, p. 64.)

4. In *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886), while it is true that the actual decision did not directly involve the Government or the Indians, the importance of the case and the basis of its decision lay in the determination that "At the time the act of July 2, 1864, was passed the title of the Indian tribes was not extinguished" (at p. 66), and that, "The grant conveyed the fee subject to this right of occupancy" (*ibid.*). Respondent attempts to distinguish the case by noting that in 1867 a reservation was set aside for the Sisseton and Wahpeton Sioux. The respondent fails to note, however, that the lands involved in the case were not those contained in the reservation. Far from supporting in any way the respondent's position, the fact that there was such a treaty in the *Buttz* case merely cuts the ground from under another argument of the respondent (see Respondent's brief, pt. 1, p. 49), namely, that the establishment of a reservation necessarily wipes out aboriginal occupancy rights in areas outside the reservation. The Court in the *Buttz* case notes that Congress in 1872 recognized that the interests of the Sisseton and Wahpeton Sioux in lands outside of the reservation set apart for them remained valid and valuable and were properly the subject of a further agreement of cession (119 U. S. at pp. 68–69). It was the lands involved in this cession that were the subject of the controversy in the *Buttz* case.

5. In *Cramer* v. *United States*, 261 U. S. 219 (1923), the affirmation of aboriginal occupancy rights was clearly a ground of the decision and not an erroneous dictum, as respondent urges (brief, p. 85), and it is clear that on the respondent's theory that no such rights exist, the case should have been decided the other way. The only kind of "affirmative recognition" which appeared in the record in the *Cramer* case was *general* recognition of Indian occupancy rights in areas that Indians had improved or occupied, which is of course equally applicable to the areas improved or occupied by the Walapai Indians.

6. The second Shoshone case, *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938), involving treaty lands, might perhaps have been decided without reference to the concept of aboriginal rights, but respondent's contention that the issue of aboriginal rights was wholly irrelevant (brief, pt. 1, p. 86) is not sound. The question in that case was whether occupancy rights assured by treaty included a right to minerals. On this point the treaties themselves were silent. If the treaties effectuated a pure gratuity from the United States to the Indians, it might have been proper to construe their provisions strictly and to exclude minerals from the gift. If, on the contrary, these treaties effected an exchange or delimitation of rights which the Indians possessed prior to any treaties, then it was proper for this Court to examine into the scope of such rights and to construe

the treaty provisions in the light thereof. It was therefore relevant for this Court to find and declare (at p. 117, citing *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515) that Indian occupancy gave rise to rights "as sacred and as securely safeguarded as is fee simple absolute title" (at p. 117), that these rights were not limited to the surface of the soil, and that treaties which said nothing specific about minerals should be construed as guaranteeing to the Indians the same kind of rights they had enjoyed before they made any treaties, i. e., "the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial" (at p. 117). In short, a conception of aboriginal rights of occupancy existing as a result of undisturbed possession "from time immemorial," helped this Court to reach the decision which it did reach in favor of the Shoshone Tribe. Acceptance of the respondent's theory, which denies the existence of such aboriginal rights, would have militated against the decision actually reached, although the decision might perhaps have been reached anyway, even upon the respondent's premises, along other courses of reasoning.

Thus, of the eight leading cases in this field which were discussed in petitioner's brief and which the respondent seeks to "distinguish" away, analysis shows that while two cases might have been (but were not) decided without reference to the question of aboriginal rights, the remaining

six cases definitely support the petitioner's view of aboriginal rights and are either difficult to reconcile or flatly inconsistent with the respondent's view that there are no such rights.

As between the two doctrines, the entire weight of direct judicial authority is in favor of the rule upon which petitioner rests its case.[14]

The rule for which respondent contends finds judicial support neither in direct decision nor in

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[14] It would unduly lengthen this brief to treat in detail of additional cases cited in Footnote 8 of petitioner's main brief, which respondent attempts to distinguish. (Brief, pt. 1, pp. 86-88.) It is enough to suggest that detailed analysis will indicate that in two of these five cases, *Spalding* v. *Chandler*, 160 U. S. 394 (1896), and in *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902), the affirmation of aboriginal occupancy rights constitutes at least an alternative ground of decision.

The only judicial authority that is cited by respondent for the rule that Indian title does not exist in the absence of specific affirmative recognition, is a dictum by the Court of Claims in *Hoyt* v. *United States*, 38 Ct. Cl. 455, 464 (1903), quoted in Respondent's brief, pt. 1, at p. 33, and again at p. 93, that "Indian country" in New Mexico and Utah was limited to formal reservations. This view (which seems to have been largely based on the opinion of this Court in *United States* v. *Joseph*, 94 U. S. 614 (1876)), was definitely repudiated in *United States* v. *Candelaria*, 271 U. S. 432 (1926), and *United States* v. *Chavez*, 290 U. S. 357 (1933). Any inference from this dictum that the Court of Claims intended to deny these Indians a possessory right in the lands they aboriginally occupied is refuted by the opinion of the Court of Claims itself in *Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910), where it was held relinquishment of aboriginal possessions was valid consideration for an agreement by the United States. And see Petitioner's main brief, p. 28.

analogy. If the respondent's argument that Indian tribes enjoy only those rights specifically conferred by the Federal Government were sound, then all rights of tribal self-government would have to be derived from specific acts of Congress. Uniformly, however, in those cases where the existence of aboriginal rights of tribal self-government has been in issue, this Court has affirmed the existence of such rights. Thus in *Talton* v. *Mayes*, 163 U. S. 376 (1896), this Court refused to upset the proceedings of a tribal court, allegedly in conflict with the Fifth Amendment, declaring "that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment * * *." (At p. 384.)

Many other cases[15] may be cited in which it has been held that "*those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress,*

[15] To cite only three: In *Ex parte Crow Dog*, 109 U. S. 556 (1883), this Court held that in the absence of express Federal legislation to the contrary, jurisdiction over the murder of one Indian by another was vested in the tribe itself, and in *United States* v. *Quiver*, 241 U. S. 602 (1916), a similar conclusion was reached with respect to the offense of adultery. In *Jones* v. *Meehan*, 175 U. S. 1 (1899), this Court held that in the absence of Federal legislation to the contrary, the inheritance of Indian lands was governed by the rule of the tribe and not by the rule of the Interior Department.

but rather inherent powers of a limited sovereignty which has never been extinguished."[16]

Respondent invokes the support of uncited opinions of the Attorney General (Respondent's brief, pt. 1, p. 9) for its view that there are no Indian rights of occupancy except such as may be specifically conferred by the Federal Government. A contrary view is persuasively set forth in the most comprehensive opinion that any Attorney General has written on the nature of Indian occupancy rights.[17] From that opinion the following excerpts are taken:

> But a right of "occupancy" or "occupancy and use" in the Indians with the fee title in the sovereign (the Crown, the original States, the United States) is the same condition of title which has prevailed in this country from the beginning, except in a few instances like those of the Cherokees and Choctaws, who received patents for their new tribal lands on removing to the West. And the Indian right of occupancy is as sacred as the fee title of the sovereign.

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[16] "Powers of Indian Tribes," 55 I. D. 14, 19 (1934). The decisions in this field are analyzed in this opinion of the Solicitor of the Interior Department, which served as a basis for the drafting of tribal constitutions approved by the Secretary of the Interior, pursuant to section 16 of the act of June 18, 1934 (48 Stat. 984, 987; 25 U. S. C. sec. 476), including the constitution of the Walapai Tribe, which was approved on December 17, 1938.

[17] 34 Op. Atty. Gen. 181 (1924).

> The courts have applied this legal theory indiscriminately to lands subject to the original Indian occupancy, to reservations resulting from the cession by Indians of part of their original lands and the retention of the remainder, to reservations established in the West in exchange for lands in the East, and to reservations created by treaty, Act of Congress, or executive order, out of "public lands." The rights of the Indians were always those of occupancy and use and the fee was in the United States. * * * [At p. 187.]

In the opinion from which these excerpts are taken, Attorney General Stone went on to apply this theory to the specific question of whether Indian occupancy protected by an Executive order that made no mention of mineral rights nevertheless included mineral rights. The question was similar to that presented in the second *Shoshone* case. If an Executive order in effect gives Indians Federal property as an act of grace, it might be construed more narrowly than would be proper if such an order amounts to a confirmation or defining of a preexisting right. On this question the Attorney General declared:

> * * * If it were necessary here to decide as between these opposing views, I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, or

by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553. Moreover, support for this view is found in many expressions of the courts. Thus, in the case just cited, the court quotes from *Beecher* v. *Wetherby,* 95 U. S. 517, 525, as follows:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take *only the naked fee,* and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States." [At p. 191.]

Respondent advances no authority and no reason which would justify this Court in reversing a rule that has been tested for more than a century, has been consistently affirmed in careful and well-reasoned opinions, has been the basis of hundreds of treaties and agreements, and is in conformity with basic standards of justice and fair play. Respondent argues that the rule of aboriginal occupancy rights is supported only by dicta and not by actual decisions, but for the alternative rule which it proposes it can claim the support of no decision and no dictum.

It is clear that the doctrine of aboriginal occupancy rights is as applicable to the area involved in the case at bar as to any other part of the

United States. It is therefore unnecessary to determine whether this doctrine is ultimately to be derived from the more general rule that rights existing under former sovereignties, including rights of tenancy, are not terminated by the mere fact of conquest but remain in effect unless expressly abrogated by a new sovereign (see Petitioner's brief, p. 76), or whether the doctrine of aboriginal occupancy rights is to be derived from Federal statutes and particularly the Indian trade and intercourse laws, as Chief Justice Marshall suggested (Petitioner's main brief, p. 38), or whether the doctrine rests upon both bases equally.

In seeking to show the error of the view taken by the Circuit Court of Appeals that the rule of aboriginal occupancy, although generally applicable in the United States outside the Mexican Cession area, was not applicable inside that area, it became necessary for petitioner to demonstrate that insofar as this rule might be derived from the Indian trade and intercourse laws, these laws had the same application within the Mexican Cession area as outside that area (Petitioner's main brief, pp. 36–40). Respondent now argues that the Indian trade and intercourse laws did not create or recognize any aboriginal rights whatever[18] (Re-

[18] On this point, however, respondent is not consistent. At page 77 of its brief (part 1) it admits in a footnote that the original trade and intercourse law, the Ordinance of September 22, 1783 (25 Jour. Cont. Cong. 602, Lib. of Cong. ed.) did give Indians "possessory rights."

spondent's brief, pt. 1, pp. 75–94). If this argument is sound, all that it proves is that the question of whether these laws were extended to the Mexican Cession area so that those portions of the area occupied by Indians became "Indian country," a question to which respondent devotes some attention (Respondent's brief, pt. 1, pp. 91–94), is completely irrelevant to any issue in the case at bar. If these laws had nothing to do with Indian title, then respondent is not aided by an attempt to show that they had only a limited applicability to the Mexican Cession area.

For the sake of clarity, however, it should be noted that the respondent's criticism of petitioner's contention concerning the effect of the Indian trade and intercourse laws completely misses the point. In seeking to refute petitioner's view that the Indian trade and intercourse laws "conferred upon the historical fact of aboriginal occupancy the character of a Federal legal right or privilege, by affording legal protection to such occupancy against various forms of trespass by parties other than the United States" (Petitioner's main brief, p. 36), respondent frames and tears apart two caricatures of petitioner's view. First, respondent ascribes to petitioner, and proceeds to attack, the idea that "possession, a fact, creates a legal right" (Respondent's brief, pt. 1, p. 75). Then respondent attacks the idea that the intercourse laws by themselves create possessory rights, regardless of any facts of possession, e. g., that

extending intercourse laws to Arizona would give Indians possession of the entire State (*ibid.*, p. 89). Neither of these positions nor their sum is the position of the petitioner. The position of the petitioner is that specific Indian possessory rights are a product of two factors: (a) the fact of continuous occupancy of particular areas, and (b) general legal rules (statutory or common law) which afford protection to such occupancy. Against that position respondent advances no substantial argument.

Point 3

The right of the Walapai Tribe was not extinguished.

Under this heading the Government will first answer generally the arguments of the respondent that the Walapai Tribe's rights of occupancy were extinguished and then will discuss separately the statutes and administrative actions prior to the passage of the granting act of July 27, 1866, which the respondent contends extinguished the Walapai rights, and in conclusion will discuss the statutory and administrative action after July 27, 1866, which the respondent advances to show extinguishment. Most of the statutes and administrative action relied upon by the respondent to show extinguishment of the Walapai's rights of occupancy are completely irrelevant to the issues in this case.

A. THE EXTINGUISHMENT OF INDIAN OCCUPANCY RIGHTS REQUIRES UNEQUIVOCAL ACTION.

The material advanced by the respondent is irrelevant for three reasons. In the first place, the granting act of July 27, 1866, under which the respondent claims rights, is not ambiguous, and neither any other statutes—unless they modify the act of July 27, 1866—nor any administrative action could change the rights of the railroad which were crystallized in the granting act.

In the second place, the statutes and administrative conduct referred to by the respondent do not have the effect which the railroad says they have.

In the third place, the entire argument of the respondent concerning extinguishment violates three recognized canons of statutory construction.

A cardinal rule of construction in statutes affecting Indians has often been invoked by this Court:

> * * * doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.[19]

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[19] *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912).

As a corollary to this canon of construction Attorney General Stone in 34 Op. Atty. Gen. 171, 172, has likewise held:

> The long settled rule of construction is that general laws providing for the disposition of public lands or the public domain do not apply to lands which have been set aside or reserved for particular public uses, unless the contrary clearly appears from the context or the circumstances attending the legislation. * * * Concerning Indian reservations, Indian lands, and Indian affairs generally, Congress habitually acts only by legislation expressly and specifically applicable thereto.

A second canon of construction which is violated by the defendant's argument is that a public grant in case of any ambiguity is construed in favor of the Government. As was said in *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733, where a land grant to another railroad was involved:

> In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If, on examination, there are doubts about that intention or the extent of the grant, the government is to receive

> the benefit of them. * * * That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government, and saved from a possible grant, is a proposition which will command universal assent. * * * [At p. 746.]

A third canon of construction relevant to this case is that which directs an interpretation of ambiguous statutes that will best conform with existing treaties. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook* v. *United States*, 288 U. S. 102, 120 (1933); and see *United States* v. *Payne*, 264 U. S. 446, 448 (1924); *Chew Heong* v. *United States*, 112 U. S. 536, 549–550 (1884); *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491, 496 (1883). It has already been noted (Petitioner's main brief, pp. 47–48) that the United States, by treaty with Mexico, promised that the Indian tribes of the Mexican Cession would not be put "under the necessity of seeking new homes." Petitioner readily admits the respondent's argument (brief, pp. 72–73) that Congress had power to violate or abrogate the treaty with Mexico, but the fact remains that Congress did not do so, and if there is any ambiguous Congressional legislation which can be interpreted either in a manner consistent

or in a manner inconsistent with the treaty, the former interpretation should be preferred.

If there are any ambiguities in the legislation or administrative action upon which respondent relies to establish a denial and extinguishment of Walapai occupancy rights those ambiguities should therefore, in conformity with established rules of construction, be resolved in favor of the continuance of such rights.

Against the force of these established principles of construction respondent advances an argument that any ambiguity in the granting act or in other statutes or in the administrative action should be resolved in the light of Federal "policy." If, in spite of *Hamilton* v. *Rathbone*, 175 U. S. 414, 421 (1899), holding that the province of construction lies wholly within the domain of ambiguity and that "prior acts may be resorted to, to *solve* but not to *create* an ambiguity," it should be considered proper to construe Federal policy in relation to the granting act, a distinction should be drawn between the policy that is embodied in the governing statute of 1866 and policy elsewhere expressed. Of the two the former is entitled to the greater weight, and, as already noted, the policy embodied in the 1866 granting act recognized and safeguarded Indian occupancy rights. Respondent ignores this aspect of Federal policy and goes far afield to collect

evidences of a contrary policy. The Government submits that the picture of Federal policy thus drawn by the respondent seriously misrepresents the position of the Government and the existing facts.

In brief, respondent's argument is that the United States pursued "one clear purpose, to develop all the lands of Arizona with specified exceptions known as reservations, for and by white men" (Respondent's brief, pt. 1, p. 12; also pp. 14, 15, 23).[20] This policy, according to respond-

[20] As bearing upon the policy of confining Arizona Indians to reservations and as showing an intent to confine the Walapai Indians to the Colorado River Reservation, respondent asserts, with reference to the war waged against the Walapai Tribe from 1865 to 1868, that "the purpose of the campaigns was to force the Indians to go to the homes provided for them by Congress" (Respondent's brief, pt. 1, p. 54). This is wholly untrue and constitutes an illuminating example of the danger of following the respondent's theory that questions of this sort should be decided without a trial. In fact, the Walapai war was instituted by the Walapai "on account of the killing of a chief of their tribe by a drunken teamster on the road from Fort Mojave to Prescott" (Report of Superintendent of Indian Affairs, Arizona Territory, dated September 27, 1865, in Walapai Papers, p. 37). The war was ended in 1868, without any suggestion, on the part of the military, that the Walapai Indians were to go to the Colorado River Reservation. The only possible basis for respondent's theory is orders issued by General Gregg on April 23 and 24, 1867, which threatened military measures against all Indians outside of reservations. It appears that General Gregg was severely castigated by his superior officer for this order and the order was withdrawn on June 11, 1867 (see Report of the Secretary of War, House Executive Documents, vol. 2, pt. 1, 40th Cong., 2d sess., 1867–1868, pp. 105–106, 109–112; and see Re-

ent, was to be achieved by force and not by agreement (*ibid.*). According to the respondent, "All the country along this route [from Isleta to the Colorado River] was once 'occupied,' in one way or another, by savages, none of whom except the Navajo had ever 'voluntarily ceded' claim to any of it" (R. 92–94; Respondent's brief, pt. 1, p. 19; also pp. 26, 38–39). Against this background of fact and of policy, respondent argues, a failure to extinguish Walapai occupancy rights would constitute a startling exception. Moreover, respondent argues, since the right of occupancy is as sacred as the fee, the railroad, under such a construction of the pertinent statutes, would have received nothing of value (Respondent's brief, pt. 1, p. 19). A naked fee subject to Indian occupancy rights, it is said, could not be mortgaged or sold (Respondent's brief, pt. 1, pp. 19–20). To hold that the railroad received a valueless title, respondent argues, would be to convict the United States of fraud or imposition and of enacting a "granting act" which did not grant anything of value (Respondent's brief, pt. 1, p. 26). Finally, such a rule would unsettle all titles in Arizona (Respondent's brief, pt. 1, p. 19).

At each point the foregoing argument breaks down under close inspection. It is not true that the

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port of the Acting Commissioner of Indian Affairs, 1867, p. 155). Thus is the order of a subordinate military officer, misguided in purpose and promptly revoked, treated as evidence of an established national policy.

policy of the Federal Government was designed exclusively for the benefit of white men. On the contrary, the Federal Government, insofar as it was interested in encouraging settlement, drew no distinction between white men, black men, and red men. Where Indians were actually making use of lands the Federal Government bent every effort to protect that occupancy, as witness the decision of this Court in *Cramer* v. *United States*, 261 U. S. 219 (Petitioner's brief, p. 25), the action of Congress in inserting a proviso for the protection of Indian occupancy in the granting act in the case at bar (Petitioner's brief, p. 13), and repeated instructions from the Interior Department warning against the granting of white homesteads even outside of reservations on lands actually used by Indians.

Thus, for example, following a strong recommendation by the Commissioner of Indian Affairs, in a letter to the Secretary of the Interior, dated June 29, 1883, which protested against the issuance of homesteads in lands occupied by Indians in the Prescott District of Arizona (which included the Walapai country), a special circular was issued to registers and receivers in the General Land Office. This circular, sent by Commissioner of the General Land Office McFarland on May 31, 1884, declared:

> * * * you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the posses-

> sion of Indians who have made improvements of any value whatever thereon. [3 L. D. 371, 372.]

The circular of Commissioner Sparks, dated October 26, 1887, after setting forth the circular of May 31, 1884, in full, and calling attention to reports of violations of those instructions, declares:

> The foregoing instructions apply to every land district and to all lands occupied by Indian inhabitants in any part of the public land States and Territories of the United States.
>
> * * * * *
>
> You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon lands in the possession, occupation, and use of Indian inhabitants, or covered by their homes and improvements, and you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. [6 L. D. 341, 342.]

It is not true that the Federal Government preferred force to voluntary agreement as a method of opening up Arizona to settlement, and respondent offers no instance of any such preference. Indeed, so far is the respondent from establishing the existence of its asserted policy against agreements of land cession that it feels obliged to engage in an arduous effort to prove that the Walapai Tribe agreed to surrender the entire Walapai

country in exchange for a right to live on the Colorado River Reservation (Respondent's brief, pt. 1, pp. 49–51; and *cf.* Petitioner's brief, pp. 42–44, 98–99). Petitioner, insisting that no agreement of cession has yet been made with the Walapai Tribe, also insists that it is still within the power of the Walapai Tribe and the United States to make an agreement for land cession fair to both parties and to all third parties.

So far was the United States from the suggested policy of refusing to make land cession agreements in the area traversed by the respondent railroad that in fact it opened up the projected route of the Atlantic and Pacific Railroad by a series of treaties, concluded within two years after the Railroad Grant Act of 1866 whereby aboriginal occupancy rights of the Arapaho, Cheyenne, Kiowa, Comanche, Eastern Apache, and Ute Tribes, which maintained aboriginal occupancy rights east of Isleta, were extinguished (see Petitioner's brief, p. 49). West of Isleta, in the area on which the Atlantic and Pacific Railroad actually constructed its line, the land surrounding the greater part of this right-of-way was (despite the denial of this fact at pp. 19, 26, and 39 of Respondent's brief) [21] opened to settle-

[21] Respondent's error in this respect has precedent in official reports. Thus the Secretary of the Interior's report of 1860, cited by respondent (brief, pt. 1, p. 44) asserts that no treaties had been made with Arizona tribes although at that time treaties had actually been made with the two

ment by treaties with the Navajo and the Apache (Petitioner's brief, p. 49) and only the remaining small fraction appears not to have been covered by any treaty or agreement of cession. At the very least, then, the respondent's predecessor received the greater part of all the lands to which it could possibly lay claim, freed of all Indian occupancy rights by voluntary agreement of the Indians themselves. Certainly the proviso in the granting act that Congress would extinguish such rights only with Indian consent and only if it considered such extinguishment in the public interest was a sufficient warning that some portion of the grant lands would be burdened with an Indian occupancy right. In this aspect of the case the charge that protection of such occupancy rights would amount to bad faith is wholly unjustified. Entirely rhetorical is the respondent's "forceful reminder that purchase and not confiscation is the American way of obtaining private properties for Indian use" (Respondent's brief, pt. 1, p. 60) when the respondent's whole argument is designed to show (erroneously in the opinion of petitioner) that confiscation and not pur-

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most important tribes of Arizona, the Apache and the Navajo, and with a third tribe, the Ute or Utah, occupying a small part of Arizona. See Treaty of September 9, 1849, with the Navajo Tribe (9 Stat. 974); Treaty of July 1, 1852, with the Apache Nation (10 Stat. 979); Treaty of December 30, 1849, with the Utah (9 Stat. 984). And see various treaties discussed and cited at pp. 49–50 of petitioner's main brief.

chase is the American way of obtaining Indian properties for non-Indian use—in Arizona.

Finally, the respondent's argument that it was imposed upon by the Government, if in the small part of its grant lands that may be subject to Walapai occupancy, such occupancy rights were not promptly extinguished is without merit. The argument that ownership of land subject to an Indian occupancy right is worthless because the occupancy right is substantially as valuable as the fee, is entirely fallacious. Lands burdened by an Indian occupancy right have been bought and sold for valuable consideration. The value of such lands depends, like the value of any future interest, upon a contingency. The contingency in this situation is that the United States (and not the railroad) will remove the Indians from the lands, or that the Indians themselves will abandon the lands. In either case, the right of possession will then automatically accrue to the holder of the fee. Titles burdened by Indian possession have been the subject of many important transactions noted by this Court. See *Clark* v. *Smith*, 13 Pet. 195, 201 (1839); *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 68 (1886). The alleged quotations from the opinion of this Court in *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733 (1875), which are cited by respondent (Respondent's brief, pt. 1, pp. 19, 20) to show the practical impossibility of selling or mortgaging lands burdened by Indian occu-

pancy rights, have not been located, but the opinion in question, as read by petitioner, demonstrates precisely the opposite. In the *Leavenworth* case this Court pointed out (at p. 744) that grant lands burdened by Indian occupancy would be practically worthless *unless the Government intended to extinguish the Indian title,* and that if the Government wished to do this it would presumably include in the granting act direct promissory language similar to that used in the 1866 act granting lands to the respondent's predecessor. The Court went on to declare:

> * * * The Congress that made this grant made one, eight months before, to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and of other roads connecting therewith; in which it agreed to extinguish as rapidly as possible the Indian title, for the benefit of the companies.[22] This was necessary, although their roads ran through territory occupied by wild tribes; but this passed through a reservation secured by treaty, and occupied by Indians at least partially civilized. A transfer of any part of it would be wrong; and, as the act does not mention it, there is no reason to suppose

[22] The language referred to is found in section 2 of the act of July 1, 1862 (12 Stat. 489, 491–492), reading as follows: "The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

> that Congress, in making the grant, contemplated the extinction of the Indian title to all. * * * [At p. 744.]

Thus, far from lending any support whatever to respondent's argument, the *Leavenworth* case actually gives complete support to the position of petitioner, not only with respect to the interpretation of the granting act in the case at bar but also with respect to the practical value of even an encumbered fee where the Federal Government has undertaken to extinguish Indian title. Finally, the language quoted affords a clear statement of Congressional policy as to the necessity of affirmative action to extinguish the aboriginal occupancy rights of nonreservation Indians in the Mexican cession area.

Thus, even if all (and not only a minor fraction) of the railroad grant lands of respondent's predecessor had been within the Walapai country and even if all such lands had been burdened by an Indian possessory right, it would not follow that the railroad had been imposed upon by the Federal Government or that Congress was wasting its time when it dealt with the railroad title to the lands in question and authorized mortgages, exchanges, and various other transactions.

There is a further fallacy in the respondent's contention that Congressional legislation affecting the railroad must be interpreted as extinguishing all Walapai occupancy rights. Respondent assumes, in this argument, that the entire area set

forth in petitioner's complaint was actually possessed and occupied by the Walapai Indians and that if the Walapai had any occupancy rights at all, then in this entire area the railroad was without a beneficial interest in any of its grant lands. This, however, is a misuse of the doctrine that a complaint must be accepted as true for purposes of determining its sufficiency. Actually, it is possible that the Walapai Tribe will be able to sustain its claims only to modest portions of the area described in the complaint. Should this be the case, the railroad will have received, in addition to unencumbered title over all of its grant lands outside the area of the complaint, an equally unencumbered title to some large or small portions of the lands within that area. Since this involves a question of fact that has never been decided, it was perfectly reasonable for Congress and the administrative authorities to treat the railroad grant lands within the area now in question as involving not only a fee title, which was valuable even if encumbered, but also perhaps an unencumbered fee title to an undetermined portion of these lands not actually occupied by the Walapai Indians.

Thus at every essential point respondent's argument that Congress, if it acted in good faith, must have denied *all* Walapai occupancy rights in the area now claimed, breaks down.

Certain of the considerations advanced by respondent in the course of this argument may be

relevant, if this case comes to trial, to the question of what standards of proof are to be required for the establishment of Indian occupancy. These considerations, however, are premature at the present stage of proceedings.

Respondent seeks to give the impression that from 1866 to the institution of this suit in 1937 the possessory rights of the respondent and its predecessor were never challenged and that this long delay reflects the tenuous character of the claims which the Government now advances on behalf of the Walapai Tribe (Respondent's brief, pt. 1, pp. 5, 23). The facts with respect to the responsibility for the late date of this litigation are quite different.

Until very recently the respondent made no attempt to interfere with the actual possession of the lands in question by the Indians. That possession, as stated in the complaint, has continued from time immemorial to the date of the institution of the suit (R. 4–19). The respondent itself asks this Court to take judicial notice of a communication from the Secretary of the Interior to the Chairman of the Senate Committee on Indian Affairs urging enactment of legislation for "exchanges of Government and privately owned lands in the Walapai Indian Reservation" (Respondent's appendix, pp. 104–106). This letter points out that until the railroad grant lands were first surveyed, shortly before the date of the letter, December 6, 1923, the railroad grant lands were be-

ing leased by the Government and the rentals being credited to the Indians.

> * * * Before the odd-numbered sections had been actually identified by a survey and marked on the ground, the Department held that it had authority to lease as grazing districts the unsurveyed lands within the reservation and apply the rental for the benefit of the Indians; and the Indians otherwise have had practically the free and unrestricted use of their reservations [illegible] had been actually identified by a survey changed, and the railroad company, through its attorneys, are alleging that the Indians are committing waste upon the company's lands by felling and removing the timber, and by grazing lands for which the company has received no benefit and given no authority. This Department has been asked to make an investigation to ascertain the extent of these unlawful acts, and it has been stated to us that the company would like a settlement of these difficulties without resorting to suit. * * * [This letter is quoted from the original, which differs in minor respects from respondent's appendix, p. 105.]

The attempt to negotiate such a settlement brought to a head the issues which are presented to this Court in the current litigation.

For whatever delay has occurred in the presentation of these issues to the courts, primary responsibility, therefore, lies not with the petitioner but with the railroad, which, only within the past

few years, has sought to upset an occupancy that has continued undisturbed for many centuries before and for many decades after the alleged claim of the railroad to possession of these lands first arose. Possibly some small share of blame may be ascribed to the Government for failing, years ago, to foresee that the respondent would claim not only title to the reservation lands but the right to eject the Indians therefrom. Possibly, too, some slight share of responsibility for delay in the presentation of these issues may be ascribed to the unfortunate decision of this Court in *United States* v. *Joseph*, 94 U. S. 614 (1876), which, until overruled implicitly in *United States* v. *Sandoval*, 231 U. S. 28 (1913), and explicitly in *United States* v. *Chavez*, 290 U. S. 357 (1933) (see Petitioner's main brief, pp. 31–32), gave support to a belief widely current in the Mexican Cession area that the United States had a lesser degree of responsibility for the protection of nontreaty Indians in that area who had enjoyed civil rights under the Mexican Government than it had to Indians in other parts of the country and that this lesser responsibility did not include the protection of land claims. However this may be, respondent cannot escape primary responsibility for fixing the date of this litigation by refraining, until very recently, from committing the acts of trespass which are the gravamen of the present complaint (R. 8, 19).

B. NONE OF THE MATERIAL UPON WHICH RESPONDENT RELIES INDICATES AN EXTINGUISHMENT OF WALAPAI OCCUPANCY RIGHTS PRIOR TO 1866.

The railroad contends that legislation and administrative conduct prior to the granting act of July 27, 1866, extinguished Walapai rights or failed to recognize them so that the lands were free from Walapai claims when the granting act was passed and therefore the railroad's title was free from Indian occupancy rights when the granting act was passed. That there is no need for affirmative recognition of occupancy rights has been elsewhere argued by the Government (Petitioner's brief, pp. 27–29; Reply Brief, pp. 21–41).

Despite the charge of the railroad that the Government has ignored pertinent legislation and administration prior to 1866, the Government has already discussed all of these matters.[23]

The respondent claims that the act of March 3, 1851 (9 Stat. 631), and the failure to ratify negotiations with California Indians for treaties,

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[23] The preemption act of September 4, 1841 (5 Stat. 453), Petitioner's main brief, pages 40–42; the Treaty of Guadalupe Hidalgo (9 Stat. 922), *ibid.*, pages 48, 60; the act of September 9, 1850 (9 Stat. 446, 452), organizing New Mexico Territory and extending the trade and intercourse acts to that Territory, pages 38–40; the act of March 3, 1851 (9 Stat. 631), to ascertain and settle private land claims in California, *ibid.*, page 84; and the act of July 22, 1854 (10 Stat. 308), establishing the office of surveyor general in New Mexico, Kansas, and Nebraska, *ibid.*, pages 40, 41, and 46.

establish that all rights in the entire Mexican Cession were abolished and that the same land policy which was adopted for California was effective in Arizona (Respondent's brief, pt. 1, pp. 40–42). Arguments from the California situation are of little value because the law governing the protection of Indian rights was peculiar to that State. *Barker* v. *Harvey*, 181 U. S. 481 (1901); Goodrich, The Legal Status of the California Indians (1926), 14 Calif. L. Rev. 83, 157, and Petitioner's brief, p. 84. The act of March 3, 1851 (9 Stat. 631), relating to California specifically directed the Commissioner to report on Indian land claims (sec. 16) and provided that all claims not filed within the period specified in the act were abandoned. But the act of March 3, 1891 (26 Stat. 854), to establish a court of private land claims for Arizona specifically prohibited that court from interfering with Indian claims.

All that the respondent shows, in its discussion of the unratified California treaties, is that in California the President and the Senate, whose joint action might have formulated a national policy, were unable to agree on any policy at all (Respondent's brief, pt. 1, p. 41). Respondent's argument on Indian treaties in the Mexican Cession area shows only that out of a long series of Indian treaties by which the United States secured the extinguishment of aboriginal occupancy rights in a large part of the Mexican Cession area, one treaty, with the Tabeguache Band of Utes, pro-

vided that the Band would retain only those rights (presumably rights of occupancy but not of alienation) enjoyed under Mexican law (and not, as Respondent's brief erroneously states at page 44, that the Government would not "recognize any rights in the Indians").

It is next said by the railroad (Respondent's brief, pt. 1, p. 40) that the act of September 9, 1850 (9 Stat. 446), creating a Territorial government for New Mexico (Arizona), and granting to that Territory two sections in each township for school purposes, extinguished Walapai rights. That such a grant of school lands does not extinguish Indian rights has been held by this Court in two cases. *Beecher* v. *Wetherby*, 95 U. S. 517 (1877), *Wisconsin* v. *Hitchcock*, 201 U. S. 202 (1906). The assertion in Respondent's brief, pages 61 and 63, that the act of March 3, 1853 (10 Stat. 244), expressly declared that the even-numbered sections in Arizona were public lands is misleading because the Indian Intercourse Act of June 30, 1834 (4 Stat. 729), and the preemption act of September 4, 1841 (5 Stat. 453), and the instructions of the General Land Office (Reply Brief, pp. 48–49), all prohibited settlement upon or the preemption of lands occupied by Indians. See *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 70 (1886).

The argument (Respondent's brief, pt. 1, pp. 49–53) that the provision in the appropriation act

of March 3, 1865 (13 Stat. 541, 559), authorizing the establishment of a reservation for the Indians of the Colorado River and its tributaries, automatically wiped out the rights of the Walapai Tribe in all other areas has elsewhere been answered (Petitioner's main brief, pp. 42–45; reply brief, p. 31, *supra;* and see pp. 73–74, *infra*), and it need only be added that there is no logical or legal merit in the respondent's argument that "The use by Congress of the term 'reservation' is conclusive that the Walapai had no recognized right elsewhere * * *." (Respondent's brief, pt. 1, p. 49.) In fact this Court has recently held that the use or non-use by Congress of the term "reservation" proves nothing at all. *United States* v. *McGowan*, 302 U. S. 535 (1938).

That General Kearney incorporated the Pueblo Indians (Respondent's brief, pt. 1, p. 40); that the Government sent one Captain Mowry to investigate titles in Arizona (Respondent's brief, pt. 1, p. 44); that Congress reserved to itself the right to confirm Spanish and Mexican grants until 1891 (Respondent's brief, pt. 1, p. 44); that the United States established land offices in Arizona, began surveys, and instructed the surveyor general what work he was to do (Respondent's brief, pt. 1, pp. 42, 45), did not deny or extinguish any Walapai rights, as they are asserted to have done. Indeed, these matters are completely irrelevant to the question of whether Walapai rights were ex-

tinguished prior to 1866. Thus, neither Congress nor the Executive, prior to 1866, extinguished any Walapai rights and those rights existed when the granting act of 1866 was passed (see also Petitioner's brief, pp. 47–59, 80–82, 85–87).

C. THE 1866 GRANTING ACT DOES NOT EXTINGUISH ANY SUCH RIGHTS.

The Government has shown that the act of July 27, 1866 (14 Stat. 292), safeguarded and did not extinguish Walapai rights of occupancy (see Petitioner's brief, pp. 13–15; reply brief, pp. 11–21).

D. SUCH RIGHTS HAVE NOT BEEN EXTINGUISHED SINCE THE 1866 GRANTING ACT.

If the Walapai Tribe had a right of occupancy which was not extinguished before July 27, 1866, or by the granting act of that date, it is necessary, in order for the railroad to succeed upon its argument that the Walapai rights were extinguished, that it point to a specific statute which modified the granting act of July 27, 1866, or show that the Walapai rights were extinguished in accordance with the provisions of the granting act of July 27, 1866, requiring, so far as the railroad is concerned, voluntary cession by the Indians. Aside from a vague suggestion that the Walapai voluntarily exchanged their occupancy rights in their homeland for a right to live in the Colorado River Reservation (Respondent's brief, pt. 1, pp. 49–51; *cf.* Peti-

tioner's brief, pp. 42–44, 98–99), the respondent shows no voluntary or other cession by the Walapai. In fact, the Indians still occupy the land. Nor has the respondent pointed to a single statutory enactment which even vaguely hints that the Walapai rights were extinguished.

The act of April 20, 1871 (17 Stat. 19), authorizing the railroad to mortgage its property, the mortgage itself, and the act of March 3, 1897 (29 Stat. 622), authorizing the purchase of the railroad at a foreclosure sale, do not deny or extinguish any Indian rights. The last-mentioned act admonished the purchasers at the foreclosure sale that they would get by their purchase only what the railroad had. Ownership of lands "is not strengthened by giving a mortgage upon them." *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733, 753 (1875).

It is completely irrelevant to the issues in this case that five cases involving different problems under the grant to the respondent have been before the Court (Respondent's brief, pt. 1, pp. 20, 21); that claims by some tribes against the Government for money as damages have been denied (Respondent's brief, pt. 1, pp. 33, 34), and that the President vetoed a bill which would have appropriated money for California Indians (Respondent's brief, pt. 1, p. 34).

The respondent can obtain no comfort from its quotations from Donaldson, The Public Domain

(Respondent's brief, pt. 1, pp. 41, 42), that California and Arizona became public domain because Donaldson makes the same statement about all other States then in existence excepting Vermont, Kentucky, Maine, Texas, and West Virginia (Donaldson, *ibid.*, 420–458), and what he meant was that the Government had the power to grant title. To draw from Donaldson's statement about Arizona the inference that Indian occupancy rights had been extinguished would require the conclusion that there are not now and never have been any Indian occupancy rights anywhere in the United States.

The act of July 10, 1886 (24 Stat. 143), providing that the railroad's grant lands should be taxable after survey applied to all railroad grants and did not refer to Indian occupancy rights. A mere reading of that statute refutes the railroad's argument that Congress by said act intended to extinguish Indian rights. The act of July 31, 1876 (19 Stat. 102, 121), requiring all railroads to pay the cost of surveying their lands had nothing to do with Indian rights. The railroad's argument that these statutes extinguished Indian rights (Respondent's brief, pt. 1, p. 62), would lead to the conclusion that all lands granted to all railroads throughout the United States were by virtue of the grants freed from Indian occupancy rights.

The Taylor Grazing Act[24] (48 Stat. 1269, 49 Stat. 1976) and the Transportation Act of 1940 (act of September 18, 1940, 54 Stat. 898), have nothing to do with this case nor can the railroad gain any comfort from the map shown facing page 48 of its brief for that map designates all of the Walapai Reservation, both the odd-numbered and the even-numbered sections, as an Indian reservation.

Finally, respondent contends that the Secretary of the Interior has conclusively adjudicated the railroad's right to the land and that, therefore, even if the Walapai Indians had a right of occupancy in the land that right was extinguished (Respondent's brief, pt. 1, pp. 68–71). This is erroneous. Insofar as the adjudication consists in the issuance of patents, it would not relate to the lands in the first cause of action since they were never patented, nor to so much of the lands covered by the second cause of action as, according to the respondent's brief (pt. 1, p. 68), were not patented. Insofar as it refers to correspondence within the Department in 1919 and 1920, concerning the payment for the cost of the survey of the reservation (Respondent's brief, pt. 1, p. 71), the decision of the Department was not directed to or

[24] The Taylor Grazing Act does not apply to any of the lands in controversy, since the title to such lands is in the respondent. Furthermore the act permits recognition of preferential grazing rights of Indians living within a grazing district. 56 I. D. 308 (1938).

conclusive of the questions presented in this case. The question before the Secretary of the Interior in 1919 was whether the Government's share of the cost of survey of the Walapai Reservation should be paid from the continuing appropriation for surveying within railroad land grants or the regular annual appropriation for surveying and allotting Indian reservations. The Secretary determined, in the letter of October 2, 1919, cited by the respondent, that the cost should be borne from the regular appropriation for surveying Indian reservations and, with respect to ownership, decided only that the lands in Indian occupancy were not excluded from the grant and that the grant to the railroad was not nullified by the subsequent reservation. Petitioner's contentions are not based on the establishment of the Walapai Reservation or on the exclusion of the land in Indian occupancy from the grant to the railroad. The Interior Department has not, either in the correspondence referred to by the respondent or at any later time, decided the question whether the grant to the railroad conveyed the title subject to the Indian right of occupancy. The respondent, therefore, misstates the decision of the Secretary of the Interior when it asserts (Respondent's brief, pt. 1, p. 71) that the Secretary of the Interior determined the "beneficial title" to be in the respondent.

However, even if the Department had made such a determination adversely to the Indians, the determination would not be conclusive, since the Department did not have power to adjudicate that the railroad had such title free of the encumbrance of Indian occupancy.

In *Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733 (1875), the Secretary of the Interior had furnished certified lists of the land which passed under the grant involved in that case and patents had been issued to the railroad at the time the United States instituted its action. Yet, this did not prevent this Court from protecting the Indian right of occupancy in the *Leavenworth* case.

In *Cramer* v. *United States*, 261 U. S. 219, 234 (1923), this question was expressly decided adversely to the railroad's contention. In the *Cramer* case this court held that the granting act of July 25, 1866 (14 Stat. 239), which did not contain any language protecting Indian occupancy, did not convey title to the railroad grantee to land occupied by Indians. The railroad contended in the *Cramer* case, as the railroad contends in this case, that the issuance of patents and the additional fact that the United States had taken a lease of the land involved had adjudicated conclusively the right of the railroad to the land and that the Government was estopped from establishing Indian rights in such land. This court rejected the rail-

road's view in the *Cramer* case as it should reject the railroad's view in this case, and said, at p. 234:

> Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights.

Therefore, the mere issuance of patents and the other administrative conduct referred to by the railroad did not adjudicate that the railroad had a right to the land freed from the Walapai right of occupancy.

Point 4

IN SO FAR AS THE ARGUMENTS OF THE RESPONDENT REST UPON A DENIAL OF FACTUAL ALLEGATIONS OF THE COMPLAINT, THEY ARE IRRELEVANT TO THE QUESTION OF THE SUFFICIENCY OF THE COMPLAINT.

Respondent has presented to this Court and to the courts below a detailed picture of Walapai history designed to show that there was no Walapai Tribe (Respondent's brief, pt. 1, p. 107; R.

30, 133–135), that the Walapai Indians never maintained possession of any defined area for any considerable period of time (Respondent's brief, pt. 1, p. 39; pt. 2, pp. 7–8, 12; R. 30, 37), that the Walapai Tribe (which, according to respondent, did not exist) "agreed" to a surrender of its ancestral homeland (Respondent's brief, pt. 1, pp. 51, 107; R. 69, 71, 192–195), that the Walapai Indians were "river Indians" and therefore entitled to share in the "Colorado River Reservation" even though the act of Congress establishing the reservation did not mention the Walapai Indians (Respondent's brief, pt. 1, pp. 36–37, 63, 101; R. 193, 205, 208), that the Walapai Tribe was removed in 1874 from the territory involved in this litigation (Respondent's brief, pt. 1, pp. 4, 54; R. 211), and that subsequently this territory was taken up by white men to the exclusion of the Walapai (Respondent's brief, pt. 1, pp. 49–50, 56–57). Each of these allegations is in direct conflict with allegations of the complaint which petitioner hopes to prove if it is permitted a trial. Although the factual assertions which respondent has made in the courts below and repeats in this Court were in large part incorporated in the supplemental order of the District Court as "findings" (R. 191–196) and are so referred to by the respondent (Respondent's brief, pt. 1, pp. 36–37), respondent now says that its allegations on these various questions of fact are "irrelevancies" (*ibid.*, p. 13) which had no effect upon the decision of the District

Court and are immaterial to the issues before this Court (*ibid.*, pp. 3–4, 13, 104). Respondent thus does not controvert the position taken by the petitioner (main brief, pp. 92–104) that if the District Court based its conclusion upon "findings" or assumptions of fact in conflict with the allegations of the complaint, then its decision must be reversed for that reason. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937); *United States* v. *Mackey*, 216 Fed. 126 (C. C. A. 8th, 1914).

Accepting the respondent's concession that the factual allegations of the complaint are to be deemed true, petitioner submits that all of the arguments of the respondent which rest upon a denial of those allegations should be eliminated from the case, as being irrelevant to the only question before this Court, that of the sufficiency of the complaint. The extent of such an elimination is perhaps not recognized by the respondent. The fact is that nearly every argument in the respondent's brief assumes the falsity of one or more factual allegations of the complaint and falls to the ground without the support of such factual assumptions.

Essentially, respondent makes two contentions: (1) that the Walapai had no possessory rights in 1866; and (2) that whatever rights they then had were subsequently extinguished.

The first of these contentions involves an argument on Spanish and Mexican law before 1848 and

an argument on the law of the United States between 1848 and 1866.

The argument on Spanish and Mexican law involves two assertions: (a) that Spanish and Mexican law did not concede possessory rights in land to those Indians classified as "denizens of forests" who wandered over a territory not "defined" or "identifiable" and did not compose an "organized" tribal community; and (b) that in fact the Walapai Indians were "denizens of forests" (Respondent's brief, pt. 2, p. 12) who were not "an organized community" capable of acquiring by prescription (*ibid.*, pp. 7–8), and whose occupancy of land (described in the complaint as "exclusive" and continuous "from time immemorial" within a well-defined area (R. 4–9, 11–16)) amounted to "the ranging of a wandering tribe over territory neither defined by limits nor otherwise clearly identifiable" (Respondent's brief, pt. 2, p. 7).[5] The respondent's argument

[5] Respondent, in part 2 of its brief, distinguishes the factual situation of the Tallapuche Indians, whose prior rights were recognized in a treaty cited by petitioner (Petitioner's main brief, p. 71), on the ground that the Tallapuche Indians "had never been conquered" (Respondent's brief, part 2, p. 5) and, further, that the Tallapuche Indians were "an organized and settled tribe" (*ibid.*). The same may be said of the Walapai Indians. There is no ground for supposing that they had even been visited, except by one nomadic missionary, before the Mexican cession, that they had ever been actually conquered by Spain or Mexico, or that they were less "organized" or less "settled" than the Tallapuche Indians. (See Petitioner's Appendix, pp. 23–42.)

as to lack of possessory rights under Spanish and Mexican law is thus squarely based upon assumptions of fact inconsistent with the complaint, and must therefore be rejected, if the allegations of the complaint are to be deemed true for purposes of this proceeding.

The respondent's second argument designed to show that the Walapai Tribe had no possessory rights at the time of the Granting Act is based on the course of Congressional legislation from 1848 to 1866. Apart from a vague argument as to Federal policy, which is elsewhere considered (pp. 45–58), the only specific argument offered by respondent with respect to any legislation enacted in this period is the argument that the Walapai Indians were "Indians of the Colorado River" and were therefore comprised in the groups for which the Colorado River Reservation was established in 1865. From this factual assumption as to the location and habits of the Walapai Indians, respondent reaches the conclusion that the possessory rights of these Indians were extinguished, by assuming as a matter of law that the establishment of a reservation for Indians automatically wipes out all prior possessory rights in other areas. The soundness of this legal proposition petitioner has elsewhere challenged (main brief, pp. 42–46). The factual assumption as to the habits and location of the Walapai Indians is not justified in the present state of the record.

In fact, so far as any inference is possible from the allegations of the complaint, a considerable portion of the Walapai country actually occupied by the Walapai Tribe (although technically within the Colorado River watershed, as is most of the Southwest) is far removed from the Colorado River or any of its tributaries. Thus, if the factual assumptions underlying the second argument of the respondent are eliminated, the argument falls.

The respondent's brief (pt. 1, pp. 51, 107) and the opinion of the Circuit Court of Appeals (R. 208) seek to buttress the view that the Colorado River Reservation was intended for the entire Walapai Tribe by asserting that the Walapai Tribe actually agreed to remove to that reservation and in that connection surrendered all land claims in other areas. This assertion is contrary to the express allegation of the complaint that the tribe "never ceded the said lands, or any part thereof" (R. 8) and that the claim of the tribe "has not been extinguished by the voluntary cession thereof" (R. 19). This buttressing argument, therefore, is as much dependent upon a factual allegation controverting the complaint as is the argument concerning the location of the Walapai Tribe on the banks of the Colorado River.

In its final argument, respondent urges that whatever occupancy rights the Walapai Indians had in 1866 were subsequently extinguished. This argument rests chiefly upon "the incontrovertible

fact [26] that the Walapai were forcibly removed in 1874 to the reservation provided for them in 1865 by Congress" (Respondent's brief, pt. 1, p. 4) and that thereafter the country formerly occupied by them was taken up by white settlers. Thus, in the respondent's account, "the country formerly occupied by them was settled up" (*ibid.*, p. 56), there was "the old story of white penetration crowding out Indian possession" (*ibid.*, p. 56), and finally, "After 1875, all the water and grass was taken by white stockmen * * *. The Walapai worked for settlers and the railroads while not 'lying around the railroad stations and small towns' " (*ibid.*, p. 57). All of these factual allegations and assumptions by the respondent, underlying its entire argument on abandonment, are in conflict with factual allegations of the complaint, and if the factual allegations of the complaint therefore are accepted as true the entire substance of the respondent's argument as to the extinguishment of rights enjoyed by the Walapai Tribe in 1866 vanishes into thin air.

Thus, without the benefit of factual assumptions inconsistent with the allegations of the complaint, the three principal arguments of the respondent fail. On the other hand, if these factual assump-

[26] The "incontrovertible fact" is controverted by the complaint which alleges that the lands in suit were continuously occupied by the Walapai Indians despite this alleged removal. The actual fact seems to be that only a small part of the Walapai Tribe was even temporarily removed in 1874. See petitioner's Appendix, pp. 45-49.

tions are to be dignified as "findings of fact" based upon "judicial notice," then petitioner submits that this procedure, depriving the Government of a trial upon the issues of the case, constitutes reversible error. When similar procedure was used to defend a suit brought by the United States to quiet title to the tribal land of another Indian tribe, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the trial court dismissing the complaint. The following quotation is revealing:

> * * * The United States was not obliged to deraign the title of the Creek Nation in its bill, but could allege the ultimate fact of ownership without more. The demurrers treated as motions to dismiss, admitted the allegation as to ownership in paragraph three above quoted. Notwithstanding this, the court dismissed the bill for the reason that the Creek Nation had no title to the land in controversy. As the only record before the court was the demurrers, and the bill, it is difficult to see how this result could be brought about. The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary, they have been turned out of court by a finding that the Creek Nation had no right or interest in the land, and this not upon any showing of the United States, but upon a case gathered from the world at large. [*United States* v. *Mackey*, 216 Fed. 126, 127–128 (1914).]

Respectfully submitted.

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior, Washington, D. C.,
Attorney for Petitioner.

RICHARD H. HANNA,
Special Attorney for the Department of the Interior,
Albuquerque, New Mexico.

WILLIAM A. BROPHY,
Special Attorney for the Pueblo Indians,
Albuquerque, New Mexico.

FELIX S. COHEN,
Assistant Solicitor,
Department of the Interior,
Washington, D. C.,
Of Counsel.

The Solicitor General authorizes the filing of this brief.

CHARLES FAHY,
Acting Solicitor General.

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